

APPEAL NO. 090075  
FILED MARCH 26, 2009

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 4, 2008, and December 2, 2008. The issues were:

1. Was [the appellant (self-insured)] the [d]ecedent's employer for purpose of the Workers' Compensation Act? [Resolved by stipulation].
2. Did the [e]mployee [(decedent)] suffer a compensable injury on \_\_\_\_\_, resulting in his death?
3. Is the [respondent] [c]laimant [b]eneficiary [s]pouse [(claimant beneficiary)]<sup>1</sup> barred from receiving death benefits because she failed to file a claim with the [Texas Department of Insurance, Division of Workers' Compensation] (Division) not later than the first anniversary of the date of the employee's death in accordance with [Section] 409.007 and, if not, does good cause exist for failure to file a claim for compensation with the Division?
4. Did the [self-insured] waive its right to dispute this claim in accordance with [Sections] 409.021 and 409.022 by not raising within a reasonable period of time that the [c]laimant [b]eneficiary [s]pouse failed to file a claim with the Division not later than the first anniversary of the date of the [decedent's] death?

With regard to the three disputed issues the hearing officer determined that: (1) the decedent suffered a compensable injury on \_\_\_\_\_, resulting in his death; (2) the claimant beneficiary is not barred from receiving death benefits because she failed to timely file a claim with the Division not later than the first anniversary of the date of the decedent's death because the self-insured has waived its right to dispute this claim based on the timely filing of a claim defense; and (3) the self-insured failed to raise the defense, within a reasonable period of time, that the claimant beneficiary failed to timely file a claim with the Division not later than the first anniversary of the date of the decedent's death and the self-insured has waived its right to dispute this claim in accordance with Sections 409.021 and 409.022.

The self-insured appealed, contending that the decedent did not sustain a compensable injury at the time of his death because he was not in the course and scope of his employment at the time and that the claimant beneficiary is barred from receiving benefits because of the untimely filing of her claim. The self-insured appealed

---

<sup>1</sup> We note that the failure to timely file a claim for compensation issue is specifically limited to the claimant beneficiary spouse.

the waiver issue by stating, it was in compliance with Sections 409.021 and 409.022. The appeal file does not contain a response from the claimant beneficiary.

## DECISION

Affirmed as reformed, in part, and reversed and rendered in part.

### BACKGROUND INFORMATION

The parties stipulated that on \_\_\_\_\_, the decedent was an employee of the self-insured (employer). It is undisputed that the decedent was a deputy sheriff for the self-insured and that just prior to the incident resulting in his death, he had been working an “extra-duty” security assignment for a local university athletic event. Being a supervisor in the sheriff’s department and a member of the sheriff’s “crisis team” the decedent was allowed, and had received permission, to drive a marked patrol vehicle. The evidence established that after concluding his security assignment for the athletic event, at approximately 1:30 a.m. on \_\_\_\_\_, the decedent, wearing his uniform, “was enroute to his 10-42 [residence]” driving on an interstate highway when a vehicle traveling in the opposite direction lost one of its tires and rim, which bounced over the center divider, striking the decedent’s vehicle windshield and hitting the decedent’s head resulting in his death.

### COMPENSABLE INJURY

Section 401.011(12) defines course and scope of employment and provides in part as follows:

“Course and scope of employment” means an activity of any kind or character that has to do with and originates in the work, business, trade or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes an activity conducted on the premises of the employer or other locations. The term does not include:

- (A) Transportation to and from the place of employment unless:
  - (i) the transportation is furnished as a part of the contract of employment or is paid for by the employer;
  - (ii) the means of the transportation are under the control of the employer; or
  - (iii) the employee is directed in the employee’s employment to proceed from one place to another place.

The general rule is that an injury occurring in the use of the public streets or highways in going to and returning from the place of employment is noncompensable. American General Insurance Co. v. Coleman, 157 Tex. 377, 303 S.W.2d 370 (1957). The rule is known as the “coming and going” rule. The rationale of that rule is that “in most instances such an injury is suffered as a consequence of risks and hazards to which all members of the traveling public are subject rather than risks and hazards having to do with and originating in the work or business of the employer.” Texas General Indemnity Co. v. Bottom, 365 S.W.2d 350 (Tex. 1963). In order for the exception to apply, the claimant must not only show that a specific exception applies, but also must show that the injury is of a kind or character that had to do with and originated in the work, business, trade or profession of his employer and was received while he was engaged in or about the furtherance of the affairs or business of his employer. Bottom.

The claimant’s position, and essentially the position adopted by the hearing officer, is that anytime a patrol officer, in uniform and driving a marked patrol vehicle, is on the public roads he or she is in the course and scope of their employment. The hearing officer, in his Background Information commented that the deceased was performing patrol duties in accordance with the policies of the county’s sheriff’s office at the time of the incident resulting in his death. The hearing officer relies on the testimony of the chief deputy sheriff who stated that a uniformed officer driving a marked car is necessarily enforcing traffic laws because he or she is watching for traffic violations and providing a visible presence of law enforcement to the public. The hearing officer also points out that Chapter \_\_, Paragraph \_\_ of the Sheriff’s Office Policy Manual states that employees will use department vehicles only with the permission of a supervisor and will use them only for official business. Finally, the hearing officer mentions that the decedent was found by the county sheriff to have died in the line of duty which is defined in Chapter \_\_ of the Sheriff’s Office Policy Manual as being the death of an active duty sworn officer during the course of performing a law enforcement function while on or off duty. The hearing officer then commented:

I find that [d]ecedent was returning to his home at the time of the fatal accident. In so doing, he was on-duty, performing patrol functions in accordance with the policies of the Sheriff’s Office. I find that [d]ecedent was in the course and scope of his employment at the time of his death on \_\_\_\_\_.

In Appeals Panel Decision (APD) 961622, decided October 2, 1996, the claimant was a police captain for the employer’s traffic and accident division wearing his uniform and driving to work in an unmarked vehicle furnished by the (City)’s police department to high ranking officers. The claimant in that case testified that he was “on duty” or “on call” 24-hours-a-day and that as he drove to work, he generally looked for traffic violators. The claimant was injured when another vehicle pulled directly in front of his vehicle, resulting in a collision. The hearing officer, in that case, determined that the injury occurred while the claimant was in the course and scope of his employment because he was “engaged in a reasonable lookout for criminal activity, and was in effect

on duty since he was subject to call at any time.” The Appeals Panel reversed the determination of the hearing officer stating “we see nothing in this case which would distinguish claimant, at the moment of the accident, from any number of other commuters on their way to work.”

Similarly in the instant case, the decedent was returning home after completing an extra duty job and the evidence established, that the decedent was not doing anything in furtherance of law enforcement at the moment of the accident, or that the decedent was exposed to greater risks or hazards having to do with or originating in the work or business of the employer as he was driving home.

APD 002546-s, decided December 12, 2000, also involved a police officer who was seriously injured driving to work in a police vehicle. In that case however, there was a written policy where police vehicles were issued to certain officers with certain limitations. The policy defined “on-duty work assignments” to include “going ‘to and from work . . . which may include temporary stops’ for snacks, soft drinks, clean uniforms, etc.” The Appeals Panel held that the policy “plainly and unambiguously provides that the claimant’s driving the police vehicle to and from work is an ‘on-duty’ work assignment.” There is no comparable written policy in this case establishing that a uniformed officer driving a marked patrol vehicle to and from his home placed the decedent in an “on duty work assignment” during transit.

In the instant case, the evidence established that the decedent had completed his “extra duty” assignment and was merely on his way to his residence when the incident occurred. The policy in evidence notes that the vehicle could only be used for official business. However, unlike APD 002546-s, *supra*, the policy in evidence in this case does not specifically provide that the decedent was in an “on duty work assignment.” While the policy allows use of the vehicle for official business, it does not provide that travel to and from the “extra duty” assignment would be in the course and scope of employment. Unlike the policy in APD 002456-s, we read the restriction of the use of the vehicle for official business as a prohibition from using the vehicle for personal reasons. The Sheriff’s Policy Manual cannot be construed to contain the sort of plain and unambiguous language which would take the decedent out of the coming and going rule which is firmly grounded in well-settled Texas case law.

The evidence establishes that the decedent was not in the course and scope of his employment on \_\_\_\_\_, resulting in his death. Accordingly, we reverse the hearing officer’s determination that the decedent suffered a compensable injury on \_\_\_\_\_, resulting in his death, and render a new decision that the decedent did not sustain a compensable injury on \_\_\_\_\_, resulting in his death.

#### **FAILURE TO TIMELY FILE A CLAIM**

The hearing officer’s decision that the claimant beneficiary is not barred from receiving death benefits because she failed to timely file a claim with the Division not later than the first anniversary of the date of the decedent’s death because the self-

insured has waived its right to dispute this claim based on the failure to timely file a claim defense, is supported by sufficient evidence and is affirmed.

### **WAIVER OF THE DEFENSE**

In an unappealed finding of fact the hearing officer found that the self-insured filed a Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) on November 1, 2005, disputing the compensability of this death claim as not being in the course and scope of employment. Review of the record establishes that the self-insured filed a notice of denial within the 60-day waiver period in accordance with Section 409.021, disputing that the claim occurred in the course and scope of employment. The hearing officer found that the self-insured raised a second defense of failure to file a claim for compensation with the Division not later than the first anniversary of the date of the decedent's death at a Benefit Review Conference in April 2007, and that the self-insured failed to raise the defense of failure to file a claim for compensation with the Division in a reasonable time after discovery of facts indicating that defense and has waived its right to raise that defense.

That portion of the hearing officer's waiver decision that the self-insured did not raise within a reasonable period of time that the claimant beneficiary failed to file a claim with the Division not later than the first anniversary of the date of the decedent's death and waived its right to that defense is supported by sufficient evidence and is affirmed. We strike that portion of the hearing officer's decision that the self-insured "waived its right to dispute this claim in accordance with [Sections] 409.021 and 409.022" without limitation to the defense of failure to timely file a claim.

### **SUMMARY**

We reverse the hearing officer's determination that the decedent suffered a compensable injury on \_\_\_\_\_, resulting in his death, and render a new decision that the decedent did not sustain a compensable injury on \_\_\_\_\_, resulting in his death.

We affirm that portion of the hearing officer's waiver decision that the self-insured did not raise within a reasonable period of time that the claimant beneficiary failed to file a claim with the Division not later than the first anniversary of the date of the decedent's death and waived its right to that defense, as reformed. We strike that portion of the hearing officer's decision that the self-insured "waived its right to dispute this claim in accordance with [Sections] 409.021 and 409.022" without limitation to the defense of failure to timely file a claim.

The true corporate name of the insurance carrier is a **self-insured governmental entity** and the name and address of its registered agent for service of process is

**COUNTY JUDGE  
(ADDRESS)  
(CITY), TEXAS (ZIP CODE).**

---

Thomas A. Knapp  
Appeals Judge

CONCUR:

---

Veronica L. Ruberto  
Appeals Judge

---

Margaret L. Turner  
Appeals Judge